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IN THE
Supreme Court of the United States

October Term, 1946

No. 1430

In the Matter of
The Petition of RED STAR BARGE LINE, INC., as owner, and
RED STAR TOWING AND TRANSPORTATION COMPANY, as Char-
terer of the coal boat "Red Star #40", her tackle, ap-
parel, etc., in a cause of limitation of, or exoneration
from, liability.

RED STAR BARGE LINE, INC., and RED STAR TOWING AND
TRANSPORTATION COMPANY,
DOLORES ROSE FORCE,
Petitioners,
Respondent.

**OPPOSING BRIEF OF DOLORES ROSE FORCE TO
PETITION AND BRIEF OF RED STAR BARGE LINE,
INC., AND RED STAR TOWING AND TRANSPOR-
TATION COMPANY FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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Table of Cases Cited

	PAGE
Ex parte Green, 286 U. S. 437	3, 4
Langres v. Green, 282 U. S. 531	2, 3, 4
The Helen, L., 109 F. (2) 884 (C. C. A. 9)	3

Table of Statutes Cited

The Jones Act, Title 46, U. S. Code 688	2
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Table of Authorities Cited

Admiralty Rule 51	4
Supreme Court Rule 38, Paragraph 5(b)	3

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Statement

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

On December 11, 1945 the decedent ARTHUR FORCE was
crushed between two coal boats in the Hudson River (R43).
He died as a result of the aforesaid injuries (R45).

Claimant brought the proceedings below on behalf of herself as widow of ARTHUR FORCE and on behalf of her eight children (R41, R42).

Decedent was employed by petitioners as barge captain of the "Red Star #40", petitioners' coal boat (R43) and claimant requested permission of the United States District Court below to vacate its injunction under limitation proceedings and to bring suit against petitioners under the *Jones Act*, Title 46, U. S. Code, Section 688 (R47-R48) and *not under any law of the State of New York* as alleged in pages 5, 7 and 8 of petitioners' brief.

Petitioners' allegation that the question involved here "projects the age-old story of 'state rights' v. 'federal Rights' " (Page 8 of Petitioner's Brief) is without foundation in fact. The Jones Act is as much a Federal Act as any Limitation Statute. The very question decided below was posed in and decided by this Court in *Langnes v. Green*, 282 vs. 531, at page 541:

"To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course;—"

Petitioners Do Not Come Within Rule 38, Paragraph 5(b) of the Rules of the Supreme Court of the United States in Order to Be Entitled to a Writ of Certiorari and They Have Filed This Petition Merely to Further Harass the Respondent, a Widow With Eight Children.

A. There is no conflict between the decision of the Second Circuit Court of Appeals herein with a decision of another circuit.

The decision herein is not in conflict with the decision of the Circuit Court herein in *The Helen, L.*, 109 F. (2) 884 (9th Circuit). In *The Helen, L.*, the Circuit Court said on page 886 " * * * a refusal of the Admiralty Court to permit the claimant to pursue his common law remedy in the state tribunal would have been a clear abuse of discretion." This was the identical result obtained herein in the Second Circuit. The fact that the claimant conceded limitation in "*The Helen, L.*," and did not herein, does not make the two decisions at variance. The decision in "*The Helen, L.*" may and probably would have been the same had the claimant refused to concede the right to limitation. There is not even a conflict between the dicta of the two circuits, let alone a conflict between decisions.

B. No important question of Local Law was decided below in conflict with applicable local decisions.

C. The question of Federal law involved herein has already been decided by this Court.

The identical issues were decided in *Langnes v. Green*, cited *supra* and *Ex Parte Green*, 286 U. S. 437.

D. The decision of the Second Circuit herein was not in conflict with the decision of this Court in *Langnes v. Green* and *Ex Parte Green* cited *supra*.

The holding of this Court in the two *Green* cases was tersely, accurately and with judicial finality summed up in the opinion of Judge Swan below in 2 sentences on page 42 of the record herein:

"So far as we can gather from Justice Sutherland's two opinions, at no time did *Green* concede the right of the vessel owner to limit. He was restrained from continuing the prosecution of his action if he insisted on putting in issue in that suit the owner's right to limited liability, but the lifting of the injunction was not conditioned upon his filing a concession of the right but upon his withdrawal of the issue from litigation in the state court."

E. The Circuit Court of Appeals has neither departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower Court so as to call for an exercise of this Court's power of supervision.

Petitioners make much of the provisions of General Admiralty Rule 51. That rule is only applicable where the damage or injury is incurred "without the privity or knowledge of such owners." Here it is alleged there was privity (R54).

It is also surprising to find petitioners objecting to the fact that claimant was required to file a statement waiving ~~any claim she might make on the theory of *res judicata*~~. A defense can always be waived, and this waiver was voluntarily agreed to by claimant's counsel in the Circuit Court of Appeals upon oral argument. Such waiver may help

but cannot possibly injure petitioners; and although it may be superfluous, in all events it can properly be objected to, if at all, by claimant.

No authoritative decisions support petitioner's contention.

The Circuit Court of Appeals (Page 42 of the Record herein) said:

"No authoritative decision has come to our attention which goes so far as the appellants contend, namely (fol. 44), that a formal concession of right to limit is a condition precedent to permitting the claimant to proceed to a jury trial in a state court action."

No authoritative decision has been supplied in petitioner's brief filed herein in support of their contention.

Wherefore the application for a writ of certiorari should be denied.

Respectfully submitted,

NACHAMIE & BENJAMIN,
HAROLD L. HASKIN,
for Respondent Dolores Rose Force.

LEONARD BRONNER, JR.,
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